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GETTING THE DEAL THROUGH

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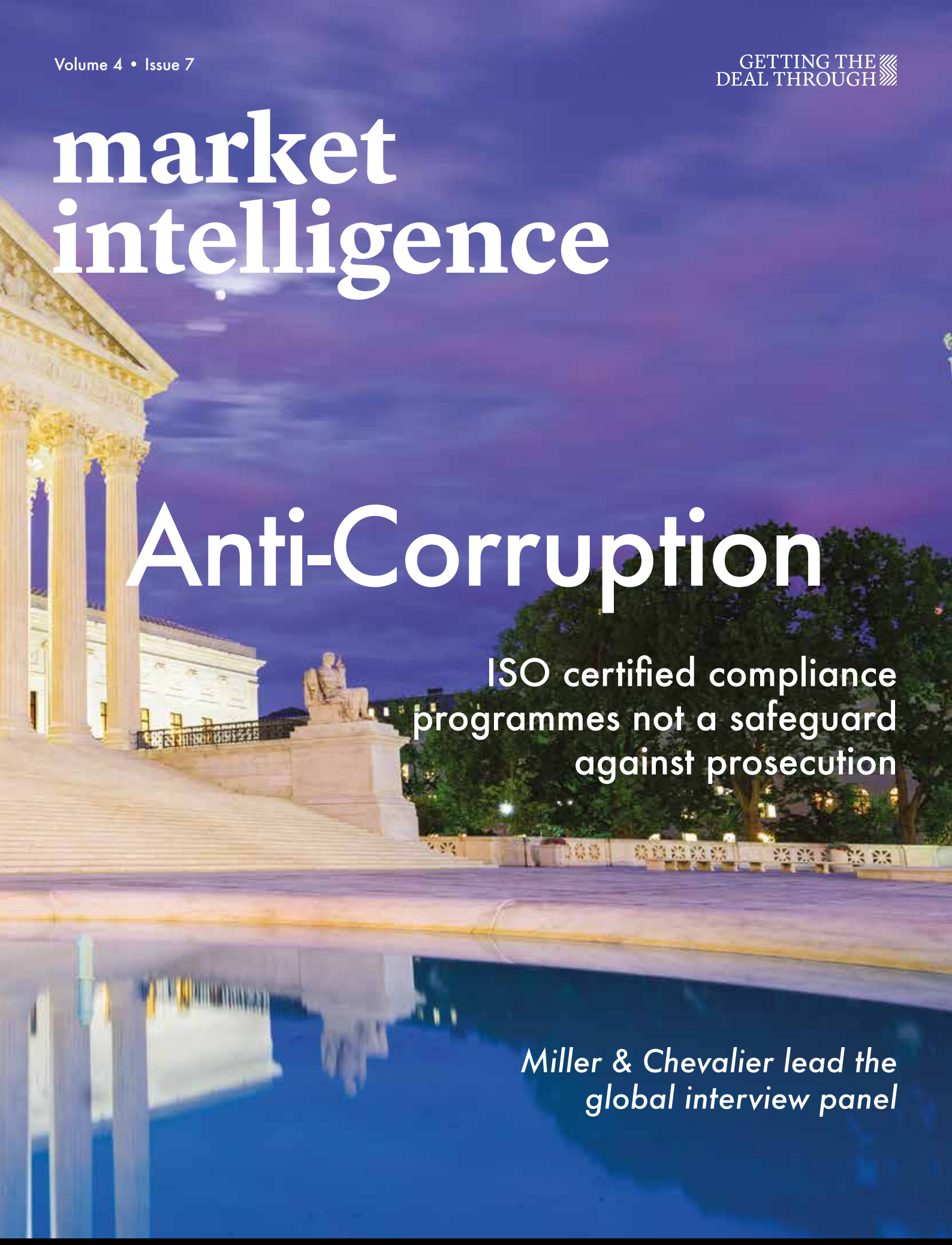

Anti-Corruption

ISO certified compliance programmes not a safeguard against prosecution

Miller & Chevalier lead the global interview panel

North America • Asia-Pacific • Europe • Latin America
Enforcement priorities • Compliance risk • Data privacy • 2017 trends

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Welcome to *GTDT: Market Intelligence*.

This is the second annual issue focusing on the latest global trends within anti-corruption regulation and investigations.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence

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In this issue

GLOBAL TRENDS

JOHN E DAVIS

John E Davis is a member and coordinator of Washington, DC-based Miller & Chevalier's Foreign Corrupt Practices Act (FCPA) and international anti-corruption practice group and he focuses his practice on international regulatory compliance and enforcement issues. He has close to 25 years of experience advising multinational clients on corruption issues globally. This advice has included compliance with the US FCPA and related laws and international treaties, internal investigations related to potential FCPA violations, disclosures to the US Securities and Exchange Commission (SEC) and US Department of Justice (DOJ) and representations in civil and criminal enforcement proceedings. He has particular experience in addressing corruption issues in West Africa, China, the former Soviet Union, South East Asia and Latin America.

In 2017, Mr Davis was appointed to serve as an Independent Compliance Monitor pursuant to an FCPA disposition following extensive vetting by the DOJ and SEC.

Mr Davis is a frequent speaker and trainer on FCPA issues and has written various articles and been quoted in media publications ranging from *Compliance Week* to *The Daily Beast* on FCPA compliance and related topics.

Mr Davis has worked extensively with clients in developing and implementing internal compliance programmes, conducting due diligence on third parties, assessing compliance risks in merger and acquisition contexts, and auditing and evaluating the effectiveness of compliance processes. Additionally, Mr Davis focuses his practice on a range of other issues relating to structuring and regulating international trade and investment transactions.

International anti-corruption efforts continue to attract attention from companies, investors, governments of both exporting and host countries and populations in general. The problems of endemic corruption are prominent factors in political crises facing countries such as Brazil and Ukraine, and in the shift of popular opinion away from entrenched regimes (for example, recently in Mexico and Venezuela). Even governments with less accountability to voters, such as those in China and Russia, evidence anxiety that corruption undermines their authority.

"Enforcement of anti-corruption laws around the globe continues on an upward, if uneven, trend."

The growing concerns regarding the corrosive political and economic effects of corruption have provided an impetus for several multinational conventions designed to combat corrupt payments and related issues. This started with the 1996 Inter-American Convention against Corruption, accelerated with the 1999 Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, and was expanded significantly with the entry into force of the UN Convention against Corruption in December 2005. The most important impact of these treaties was to require their signatories to adopt regulations prohibiting domestic and transnational corruption, and many countries have enacted laws that in significant ways mirror the provisions of the law that first focused specific attention on these issues – the US Foreign Corrupt Practices Act (FCPA), enacted in 1977.

While the grand political dynamics may not concern compliance professionals on a day-to-day basis, the growth of anti-corruption regulation globally has resulted in the need to focus not just on the long and assertive reach of the FCPA, but also on an array of other host country laws, some of which create different compliance standards or (in the case of laws related to data privacy) may undermine key aspects of a company's compliance programme if not handled appropriately. Companies also need to assess potential liability risks in many jurisdictions, as international enforcement is on the rise.

International enforcement trends

Enforcement of anti-corruption laws around the globe continues on an upward, if uneven, trend. Reporting on enforcement by the signatories of the OECD Anti-Bribery Convention is considered by many to be the best yardstick to measure this progression, as the OECD Convention parties include most of the major capital-exporting countries (which can be seen as funding the 'supply' side of cross-border corruption) as well as other key economies, such as Russia and Brazil.

The latest data on enforcement collected by the OECD Working Group on the Anti-Bribery Convention (released in August 2017) show that 397 individuals and 133 entities have been sanctioned under criminal proceedings for foreign bribery, by 17 different Convention signatories, from the Convention's 1999 entry into force to the end of 2015. In addition, the OECD reported that at least 116 individuals and 209 entities in nine different countries have been penalised for other offences related to foreign bribery, such as money laundering or accounting violations.

Transparency International (TI) has released its own assessment of the OECD Working Group reports over time. The latest TI report on 'Exporting Corruption' (August 2015) provides a less sanguine outlook – it asserts that only four countries (the United States, United Kingdom, Germany and Switzerland) 'actively' enforce their anti-corruption laws, while six other countries (Australia, Austria, Canada, Finland, Italy and Norway) manage 'moderate' enforcement. TI cites nine countries with 'limited' enforcement (though at least one of these, the Netherlands, should be upgraded on the basis of its cases in the past two years, and this figure also does not account for recent developments in Brazil, noted below). Most tellingly, TI notes that there is little or no enforcement by 20 Convention parties. However, this dynamic is fluid and it is likely that some of the countries criticised by TI will develop more active enforcement profiles.

Recent notable developments in individual countries include the continuing massive investigations of senior political leaders and major business in Brazil known as 'Operation Car Wash'. Recent consequences of what may now be the largest corruption probe in history include a US$3.16 billion fine agreed to by J&F Investimentos (J&F) with Brazilian authorities related to public bribery; the decision by Brazil's Attorney General to formally charge current President Temer with passive corruption (ie, the receipt of bribes), which Brazil's lower house of Congress subsequently rejected; the conviction of Brazil's former President Lula for passive corruption and money laundering, which is being appealed; and the dissolution of the Brazilian Federal Police Operation Car Wash Task Force, which has been criticised as potentially hobbling the ongoing investigation efforts. Most recently, in September 2017, Brazil's top prosecutor charged former Presidents Rousseff and Lula with corruption and other crimes related to activities at Petrobras, the state-owned oil company.

In August 2017, the vice-chairman of Samsung Electronics, one of the largest companies in South Korea, was sentenced to five years in prison on various charges that included bribery

"For companies under investigation, dealing with even the possibility of multiple investigations by different government authorities can create significant challenges."

and embezzlement. This action is one of several related to a larger corruption scandal that resulted in the earlier impeachment of South Korea's President, Park Geun-hye, who is herself awaiting trial on charges related to the bribery of a close associate. In a change from past scandals involving South Korean conglomerates, the potential for a presidential pardon for these defendants has been decreased, as the current President has vowed to crack down on public corruption by these companies.

Finally, on 8 November 2016, France adopted Sapin II, a new law designed to enhance the country's anti-corruption regime and to respond to OECD criticisms that France was not living up to some of its treaty obligations. Among other provisions, Sapin II established a new, more powerful anti-corruption agency and authorised French authorities to negotiate US-style deferred prosecution agreements with companies – a development that likely will facilitate international cooperation.

Trends in international cooperation and legal assistance

International cooperation through mutual legal assistance provisions of bilateral and multilateral treaties (including, most prominently, the OECD Anti-Bribery Convention and the OAS Convention) continues to accelerate. The OECD's 2014 Foreign Bribery Report found that '13 per cent of foreign bribery cases are brought to the attention of law enforcement authorities through the use of formal and informal mutual legal assistance between countries for related criminal investigations accounts'.

In April 2016, the OECD held a workshop on mutual legal assistance in international corruption investigations that highlighted both the challenges and the growth of best practices regarding cooperation. Enforcement authorities from 20 countries participated in the workshop, including China. In July 2017, the new International Anti-Corruption Coordination Centre (IACCC) was launched under the auspices of the UK National Crime Agency, with the goal of 'bring[ing] together specialist law enforcement agencies around the world to tackle allegations of grand corruption.' IACCC participants include the UK, US, Australia, New Zealand, Canada and Singapore, with Switzerland and Germany as observers and the planned future involvement of Interpol. While most of these countries already engage in significant international cooperation generally, the IACCC participants will share intelligence and conduct other mutual assistance activities designed to 'bring corrupt elites to justice.'

Many significant corporate corruption investigations feature international cooperation among authorities. For example, while the Car Wash scandal in Brazil has resulted in extraordinary political and legal events in that country, including the recent impeachment of one President and charges against two others, the ongoing investigation also shows many signs of international cooperation. Petrobras itself is under investigation by the US Department of Justice (DOJ) and Securities and Exchange Commission (SEC), and several other companies have publicly disclosed related investigations by the US authorities. Brazil's Public Prosecutor's Office announced that, as of December 2016, the Car Wash investigation had generated 120 international cooperation requests. The investigation has led to multinational settlements involving major companies such as Embraer, Rolls-Royce, and Obebrecht/Braskem. In February 2017, Brazilian authorities announced the formation of an international task force to investigate corruption allegations related to Odebrecht throughout Latin America, with 11 countries participating.

On the other hand, international cooperation can often be difficult and time-consuming. A survey by the OECD conducted in December 2015 indicated that '70 per cent of anti-corruption law enforcement officials report that mutual legal assistance challenges have had a negative impact on their ability to carry out anti-corruption work'. For companies under investigation, dealing with even the possibility of multiple investigations by different government authorities can create significant challenges related to coordination of sometimes competing government priorities, additional costs and the quantification of liability risks (the last especially in countries where investigators are inexperienced or not subject to effective due process).

International guidance on anti-corruption compliance programmes

The US authorities in charge of enforcing the FCPA have set out the basic elements of what they consider to be the key elements of an 'effective' anti-corruption compliance programme. The authorities initially provided this guidance through a series of annexes to specific investigation dispositions, which the agencies over time revised to add details based on issues identified by them and compliance professionals. The culmination

of that effort is contained in the US agencies' 2012 publication *A Resource Guide to the U.S. Foreign Corrupt Practices Act*. A guidance document issued in February 2017 by the DOJ was designed to help companies evaluate the robustness of their compliance programmes by reciting a series of questions focusing on various programme elements, though the document does not provide benchmarks. Similarly, the UK Ministry of Justice in 2011 issued guidance regarding what it considers to be 'adequate procedures' for companies to put into place to prevent bribery; these are to be used to determine whether a company has a defence against a UK Bribery Act charge that it failed to prevent bribery by an associated person.

International bodies have long focused on issuing their own guidance regarding the structure and key provisions of corporate compliance programmes. The OECD has led the field in this area, with its first *Guidelines for Multinational Enterprises* issued in 1976. The seventh of these guidelines stated that companies should 'not render – and they should not be solicited or expected to render – any bribe or other improper benefit, direct or indirect, to any public servant or holder of public office'. The OECD has updated these *Guidelines* several times, with the current 2011 version containing more expansive language.

As part of its ongoing specific anti-corruption programme, the OECD Council issued a resolution on 26 November 2009 that focused on a number of recommendations for 'Further Combating Bribery of Foreign Public Officials in International Business Transactions'. This resolution was supplemented by two annexes – the second, which the Council adopted on 18 February 2010, is 'Good Practice Guidance on Internal Controls, Ethics, and Compliance'. This document lists key elements of an anti-corruption compliance programme and related accounting controls.

The UN Convention against Corruption (UNCAC), which entered into force on 14 December 2005, established in its article 12.2(b) that all of its signatories 'shall take measures' to 'prevent corruption in the private sector', including 'promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business'. The UNCAC does not define those standards, but this obligation covers the convention's 178 parties and thus essentially globalises the establishment of compliance programmes and related systems for companies operating internationally.

The International Chamber of Commerce (ICC) issued its first set of 'Rules on Combating Corruption' in 1977. The ICC updated its rules in 2011, and the current version contains specific advice on what the ICC considers to be the essential elements of a compliance programme.

Most recently, on 15 October 2016, the International Organization for Standardization (ISO) issued a new standard for 'anti-bribery management systems', called ISO 37001. The goal of this exercise was to create an internationally recognised standard for such compliance systems that would allow for certification by third-party auditors. The standard acknowledges that it is built on previous guidance from the OECD, ICC, TI and 'various governments', though it differs in certain respects on terms of requirements and coverage (for example, risks from mergers and acquisitions are not specifically covered). The standard contains information regarding how companies can achieve the relevant ISO certification.


John E Davis

By mid-2017, only Singapore, Peru and the Philippines had formally adopted ISO 37001. Several companies, including Alstom SA and CPA Global, have announced that they have been certified under the standard after assurance audits by independent organisations. Several other prominent multinationals, including Microsoft and Wal-Mart, have said that they will adopt the standard for their operations and have been seeking a method for certification.

Some enforcement officials have warned companies, however, that ISO certification of their

compliance programmes should not be considered as a safeguard against prosecution. For example, in November 2016 a DOJ official stated that while 'certification is a factor, the DOJ would have a lot of questions about what was done' and would evaluate 'how the programme was adopted at the time.' More recently, another DOJ official stated that the certification 'may be helpful, but the DOJ will look at your programme, not a proxy for your programme' and that DOJ will want 'evidence that what you're doing is working.'

Efforts to measure 'demand' for bribes

While compliance programmes are designed to constrain the 'supply' of bribe payments to public officials by businesses and their associated personnel, there is also an increasing focus on attempting to gauge and deter the 'demand' side. Deterrence generally is handled by local laws that govern the conduct of officials, and all of the major anti-corruption conventions require their state parties to enact and enforce those laws in good faith. Because today's standards require that compliance programmes be designed to mitigate the actual risk faced by companies across the globe, there is a need for compliance professionals to follow efforts to measure the actual deterrence effect of those local laws (and, thereby, the actual likelihood that corrupt payments will be solicited in specific countries of operation).

TI remains the most cited resource for this information. Since 1995, TI's Corruption Perceptions Index (CPI) has ranked countries (176 in 2016, the latest survey) by perceived levels of corruption. Those countries ranked lower on the survey are perceived as more corrupt, and thus are considered to harbour higher demand for official corruption. (TI has also published a Bribe Payers Index to attempt to begin quantifying the supply side of the bribery equation – the most recent version issued in 2011 ranks 28 'leading economies'.) TI's CPI rankings are frequently used by companies, and sometimes by enforcement agencies, as measures of potential overall corruption risks in the countries ranked.

The World Bank's Enterprise Surveys provide another source of perceived levels of corruption in various countries. This source covers 139 countries, though some of the data sets on individual countries are ageing – many are over five years old and a few are now a decade old. According to the World Bank, the data is based on survey responses by over 127,000 firms worldwide. Compliance professionals may find here information that is more directly related to day-to-day operational issues, as the surveys cover responses to 12 'indicators', including the likelihood of having to make a payment or gift to obtain an operating licence, the value of a gift to an official expected to secure a government contract, or percentage of firms expected to give gifts to officials to 'get things done'.

There are also regional efforts to measure corruption demand. One example is the Latin America Corruption Survey. This survey, conducted by 14 law firms practising across the region every four years, was updated in summer 2016. The key focus of the questions is the perceived effectiveness of local anti-corruption laws. The 2016 survey found that 77 per cent of respondents region-wide stated that their relevant anti-corruption laws were ineffective, and 52 per cent stated that they believed that they had lost business to competitors that paid bribes. In addition to trends on the demand side, the survey also provides useful information for benchmarking compliance efforts; for example, the responses discuss specific types of compliance programme activities that companies operating in the region have undertaken.

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